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# Criminal Law--Function of the Deadly Weapon Doctrine

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# STUDENT NOTES

## CRIMINAL LAW—FUNCTION OF THE DEADLY WEAPON DOCTRINE

The deadly weapon doctrine, simply stated, is that an *inference*<sup>1</sup> or a *presumption*<sup>2</sup> of malice arises from the intentional use of a deadly weapon by the accused. The courts apparently do not recognize any distinction between the words inference and presumption and erroneously use them as though they were synonymous. The defendant's use of the deadly weapon must have been intentional before the doctrine may be used;<sup>3</sup> and if the defendant contends that his use of the weapon was accidental, an instruction which fails to indicate that the jury must first find that the defendant's use of the deadly weapon was intentional before malice may be inferred or presumed is reversible error.<sup>4</sup> The doctrine, thus stated, is reasonably clear; however, its application under various conditions raises certain problems, and the attempted solutions to these problems have led to a considerable degree of conflict among the courts of the various states.

There are two main classes of cases in which the deadly weapon doctrine clearly may or may not be applied. The first of these classes includes those cases in which the doctrine unquestionably may be relied on by the prosecution. One type of case which falls within this category occurs where only the killing by the intentional use of a deadly weapon is shown and no mitigating circumstances are presented.<sup>5</sup> In such a case it would seem that a directed verdict would be proper if directed verdicts were given in criminal cases; but since that is improper, the greatest force which can be given to the doctrine is an instruction to the effect that the jury *should* find the defendant guilty of murder if they believe the facts to be as the evidence has shown them to be.<sup>6</sup> Another type of case which comes within this class is that in which the killing by the intentional use of a deadly weapon is shown, and the only evidence tending to indicate lack of malice is the statement of the defendant,

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<sup>1</sup> *Mosier v. State*, 219 Ind. 669, 40 N. E. 2d 698 (1942); *State v. Heinz*, 223 Iowa 1241, 275 N. W. 10 (1937).

<sup>2</sup> *Rhine v. State*, 184 Ark. 220, 42 S. W. 2d 8 (1937); *State v. Emery*, — Iowa —, 17 N. W. 2d 854 (1945).

<sup>3</sup> *Bramlett v. State*, 202 Ark. 1165, 156 S. W. 2d 226 (1941); *Rhine v. State*, 184 Ark. 220, 42 S. W. 2d 8 (1937); *Mosier v. State*, 219 Ind. 669, 40 N. E. 2d 698 (1942); *State v. Heinz*, 223 Iowa 1241, 275 N. W. 10 (1937).

<sup>4</sup> *State v. Burrage*, 223 N. C. 129, 25 S. E. 2d 393 (1943).

<sup>5</sup> *Kastner v. State*, 58 Neb. 771, 79 N. W. 713 (1899); *State v. Davis*, 223 N. C. 381, 26 S. E. 2d 869 (1943).

<sup>6</sup> *State v. Davis*, 223 N. C. 381, 26 S. E. 2d 869 (1943).

unsupported by other evidence, that he acted in self defense,<sup>7</sup> or that he used the deadly weapon with an intention to slightly injure rather than to kill the deceased.<sup>8</sup> It would seem to be the function of the jury in such a case to weigh the inference of malice which arises in favor of the prosecution against the unsupported statement of the defendant.

The second class of cases in which the application or non-application of the deadly weapon doctrine is clear includes those cases in which the doctrine unquestionably may not be relied on by the prosecution. This type of case arises where the evidence clearly shows that the defendant did not use the deadly weapon with malice.<sup>9</sup> An instruction in such a case that malice could be inferred or presumed from the use of a deadly weapon would certainly be prejudicial to the defendant and should be ground for reversal. A verdict in such a case which appeared to be based on such a presumption or inference should not be allowed to stand, since it would be contrary to the weight of evidence.

The greatest difficulty in the application of the deadly weapon doctrine occurs when there is some evidence, in addition to the defendant's own statement of the facts, which indicates that there was no malice. The stronger use of the doctrine is made by those courts which say that the intentional use of the deadly weapon raises the presumption or inference of malice and that the burden falls on the defendant to overcome the presumption or inference.<sup>10</sup> It is said that whether or not the defendant has succeeded in overcoming the presumption or inference is a question for the jury to determine.<sup>11</sup>

A weaker application of the doctrine in such cases is made by those courts which say that when the circumstances attendant on the use of the deadly weapon are stated in the testimony of someone other than the defendant, the presumption or inference no longer applies and it is improper to give an instruction on the inference or presumption.<sup>12</sup> This variation in the application of the doctrine shows a decided difference of opinion of the courts as to the force with which the deadly weapon doctrine should be applied, and thus,

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<sup>7</sup> *Coates v. State*, 29 Ala. App. 616, 199 So. 830 (1941); *State v. Emery*, — Iowa —, 17 N. W. 2d 854 (1945); *Nelson v. Commonwealth*, 297 Ky. 189, 179 S. W. 2d 445 (1944); *Durr v. State*, 175 Miss. 797, 168 So. 65 (1936).

<sup>8</sup> *State v. Sullivan*, 330 Iowa 817, 298 N. W. 884 (1941).

<sup>9</sup> *Simpson v. State*, 31 Ala. App. 150, 13 So. 2d 437 (1943); *Egbert v. State*, 112 Neb. 129, 193 N. W. 1014 (1924).

<sup>10</sup> *Taylor v. State*, 201 Ind. 241, 167 N. E. 133 (1929); *Patton v. Commonwealth*, 235 Ky. 845, 32 S. W. 2d 405 (1930); *State v. Utley*, 223 N. C. 30, 25 S. E. 2d 195 (1943).

<sup>11</sup> *State v. Capps*, 134 N. C. 622, 46 S. E. 730 (1904); *State v. Gunter*, 123 W. Va. 569, 17 S. E. 2d 46 (1941).

<sup>12</sup> *Batiste v. State*, 165 Miss. 161, 147 So. 318 (1933); *Raines v. State*, 81 Miss. 489, 33 So. 19 (1902); *Quijas v. State*, 133 Neb. 410, 275 N. W. 588 (1937).

perhaps, it indicates on the part of those courts making the weaker application something of a doubt as to whether or not the doctrine is always just. This lessening of the force of the doctrine seems to be a recognition of the fact that the doctrine is in a sense a violation of the rule that the prosecution must prove all of the elements of the crime before there can be a conviction, and of the theory that it is better to let a hundred guilty men go free than to punish one innocent man. Of the two applications of the doctrine, the weaker one seems to be the better; but perhaps, in consideration of the reasons which must have led to this less forceful use of the doctrine, it would be advisable to eliminate the doctrine entirely.

One question in regard to the doctrine, which apparently has never been answered or even considered by the courts, has been tacitly asked throughout this discussion. That question is whether the deadly weapon doctrine is a presumption or an inference. The answer is quite clear in the light of Wigmore's definition of a presumption. In his work on evidence, Wigmore says: "... the peculiar effect of presumptions . . . is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent."<sup>13</sup> Since the jury cannot be compelled to conclude that the defendant is guilty, the deadly weapon doctrine is not a presumption, and therefore it must be an inference, which, according to Wigmore, can be given whatever force the jury thinks best.<sup>14</sup> Thus where there is an inference such as the deadly weapon doctrine, a verdict in favor of the party having the benefit of the inference will not be set aside even though the fact which may be inferred has not been proved; but the jury is not compelled to decide the case as though the fact which may be inferred had been proved.

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<sup>13</sup> WIGMORE, EVIDENCE (3d ed. 1940) sec. 2491.

<sup>14</sup> *Ibid.*